Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 400

THE CHATTANOOGA STATION COMPANY,
Petitioner,

vs.

LUCY MASSEY,
Admrx. of the Estate of Frank Massey,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

To the Honorables, the Chief Justice and the Associate Justices of the United States.

Petitioner, Chattanooga Station Company, hereby petitions for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, rendered herein February 19, 1954.

OPINIONS BELOW.

The opinion of the District Court is unreported. The opinion of the Court of Appeals is reported at 210 F. 2d 167. The opinions appear in the Appendix hereto attached.

JURISDICTION.

The Judgment of the Court of Appeals was entered February 19, 1954, petition for rehearing filed March 30, 1954 and denied on May 15, 1954. The jurisdiction is in-

voked under 28 U. S. C. A., Section 1254(1)—that there is a question of Federal law, to-wit: the construction and application of the Federal Employers' Liability Act.

QUESTIONS PRESENTED.

1. Whether, under the Federal Employers' Liability Act, the Chattanooga Station Company furnished its employee Frank Massey a reasonably safe place to work.

2. Whether, under the Federal Employers' Liability Act, the Chattanooga Station Company furnished its employee Frank Massey safe appliances to work with.

STATUTE INVOLVED.

Title 45, Sec. 51, Federal Code Annotated.

RAILROADS.

"Chapter 2. Liability for Injuries to Employees. Every common carrier by railroad while engaged in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, * * * works or other equipment."

STATEMENT.

The case was tried January 2, 1953, before United States District Judge Darr and a jury. After the introduction of the plaintiff's evidence the Court, upon motion of defendant Chattanooga Station Company, directed a verdict for defendant, and held there was no negligence on

its part and that plaintiff had offered no proof of negligence against the Station Company, or that there was any reasonable inference to be drawn where there might be negligence.

A copy of the District Court's ruling is embodied in Petitioner's Appendix hereto attached, at pages 14 to 20.

Motion for new trial was filed on behalf of Lucy Massey, Administratrix, etc., January 12, 1953, and on February 6, 1953, the District Court handed down a Memo opinion overruling said motion and order was entered accordingly February 10, 1953.

Copy of said memorandum opinion and Order are embodied in Petitioner's Appendix attached hereto, at pages 21 to 23.

The case was appealed to the United States Court of Appeals for the Sixth Circuit, and on February 19, 1954 that Court rendered a decision reversing the judgment of the District Court and remanding the case for new trial.

Copy of the Opinion of the United States Court of Appeals is attached as a part of Petitioner's Appendix, at pages 24 to 27, *infra*.

Also, copy of the judgment of that Court dated February 19, 1954, appears in Petitioner's Appendix at page 28, *infra*.

Petitioner Chattanooga Station Company filed a petition for re-hearing, which was denied. Copy of the Order denying petition to re-hear dated May 15, 1954, appears in Petitioner's Appendix at page 28, *infra*.

THE FACTS.

This case originated in the United States District Court for the Eastern District, Southern Division of Tennessee, at Chattanooga, brought under the Federal Employers'

Liability Act by Lucy Massey as Administratrix of her son, Frank Massey, deceased, who while an employee of the Chattanooga Station Company received fatal injuries, to recover $100,000 for his death.

The declaration alleged that on or about February 1, 1952, while decedent was engaged in washing windows in the office of the Superintendent of the Terminal Station, at Chattanooga, Tennessee, he fell and received injuries which resulted in his death, and alleged the following acts of negligence:

1. That Frank Massey was working on top of a fourteen foot ladder which had not been equipped with safety devices or grips to keep it from slipping on the floor.

2. That the floor was of tile, and was slick, and while Massey was at the top of the ladder it slipped from under him causing him to fall a distance of twelve or fourteen feet, striking a steam radiator, resulting in injuries from which he died on the evening of the same day.

The Chattanooga Station Company defended on the theory that it was not guilty of any negligence; denied that it failed to furnish decedent Massey the necessary and safe tools, equipment and stepladders, and averred Massey was an experienced employee, had selected the type of ladder he wished to use in cleaning the windows and performing his duties, and that Massey was guilty of negligence in the manner of using the ladder he selected, which negligence proximately brought about the accident and his fatal injuries.

The proof offered on the trial was to the effect that about 3:00 A. M. on February 1, 1952, Frank Massey was cleaning the windows in the office of the Superintendent at the Terminal Station; that the windows were about eighteen to twenty feet in height, and Massey was using a straight ladder fourteen to fifteen feet long.

That the floor was terrazzo, and while Massey was on the ladder, about four or five rounds from the top, performing his work within the course and scope of his employment, the ladder slipped on the floor and Massey fell and received fatal injuries.

Furthermore, there was evidence that a fellow-employee, Finley, had used the same ladder a few minutes before Massey fell, putting Bon Ami on the glass. Finley had gone to the wash room and did not see Massey fall.

Also, the proof showed another fellow-employee, Pressley Matthis, was using a step ladder which he himself selected, and was on the outside of the Superintendent's office, in the corridor of the Terminal Station, washing the windows on the outside; Matthis did not see Massey fall.

The facts are that the Chattanooga Station Company furnished its employees approximately fifteen ladders, of various kinds and lengths, some straight ladders and some step ladders, and at least one thirty-six foot extension ladder. No witness undertook to say how many of these ladders were straight ladders, or how many were step ladders. None of the ladders was equipped with safety devices to keep them from slipping. (Massey's Appendix, C. R., 8a, Q. 11-12-14; 15a, Q. 34; 16a, Q. 6-7.)

It is true James Montgomery, witness for Massey's Administratrix, testified he had seen some ladders that were equipped with "safety devices" but they were not our (Station Company's) ladders and belonged to the electricians. (Massey's Appendix, C. R., 17a, Q. 15-16.)

No attempt was made to show what kind of "safety devices" were used on the electrician's ladders; nor was there any attempt made to show there ever existed a safety device which could be used on ladders such as the Station Company used in the course of its business.

An effort was made to show that *after* the accident the Station Company put rubber tips on the bottom of some of its ladders, but this evidence was excluded by the District Court and no exception was made by counsel for Massey, Administratrix. (Massey's Appendix, C. R., 8a, 9a, Q19-21.)

It is true there was conflicting evidence as to the length of the ladder being used by decedent Massey; but it is not true that there was conflicting evidence as to the distance the base of the ladder was placed from the wall at the time of the fatal accident.

There was only one witness who saw decedent Massey place the ladder against the wall before it fell; that was T. E. Kibbler. (Station Company's Appendix 4a.) (Massey's Appendix, C. R., 13a, XQ15-17.)

Witness Kibbler said Massey placed the ladder with the bottom about ten (10) feet from the wall. (Massey's Appendix, C. R. 11a, Q21; XQ1.) That the top of the ladder was against the wall and the bottom was out about ten (10) feet from the wall, and he thought at the time that Massey had placed the ladder in an unsafe position and that when he put his weight on it the ladder would slide back. (Massey's Appendix, C. R., 12a; 13a.)

Witness R. T. Thomas did not see the ladder until after it had fallen. (Station Company's Appendix, C. R., 5a, Q6; 7a, XQ7-8.)

Witness Pressley Matthis did not see the ladder until after it had fallen:

> "Q18. Did you see him fall? A. No, sir, I didn't." (Station Company's Appendix, C. R. 8a.)

Witness W. H. Drain did not see Massey fall. (Massey's Appendix, C. R., 3a, Q4-5.)

It is not true that evidence was excluded to the effect that Pressley Matthis refused to go upon one of the long ladders like decedent was using, on account of it being dangerous. Matthis was asked that question but did not give any answer, and when the question was repeated his answer was: "No, sir, I didn't refuse." (Massey's Appendix, C. R., 15a, Q15.)

As a matter of fact, in answer to questions by the District Court, Matthis answered that he himself had frequently used the same type of ladder Massey was using. (Station Company's Appendix, C. R., 12a.)

The undisputed evidence is that the ladder decedent Massey was using was a new, well-made ladder, in perfect condition, and even after the accident there were no defects and no broken parts about the ladder. (Station Company's Appendix, C. R., 7a and 10a, XQ14-15.)

The workmen picked their own ladders. (Station Company's Appendix, C. R., 9a, XQ2-3.)

The undisputed proof is that the floor was smooth terrazzo such as is commonly used in many public buildings, including the Federal Building in which the District Court was located. The floor had been cleaned a few hours before the accident and was dry and free from any foreign substance. (Station Company's Appendix, C. R., 7a, XQ19; 11a, XQ20-22.)

REASONS FOR GRANTING THE WRIT.

1. The decision of the United States Court of Appeals is not supported by the evidence.

(a) There was no evidence offered to the effect that the Chattanooga Station Company had not furnished a safe place for decedent Frank Massey to do his work; on the contrary, all the proof showed the floor was of ter-

razzo, a material commonly used in public buildings including the Federal Building in which the trial Court was located; the floor had been cleaned only a short time before the accident, and was dry and clean and free from any foreign substance.

(b) There was no evidence that the ladder furnished by the Station Company and selected and being used by Massey was defective in any way; on the contrary, the proof showed it was a new ladder, well-made and in perfect condition, and after the accident there were no defects in or broken parts about the ladder.

2. The Court erred in failing to set out in its opinion any evidence showing negligence on the part of the Chattanooga Station Company.

3. The Court erred in holding that there was sufficient evidence of negligence, in the failure of the Station Company to use reasonable care to furnish decedent Massey with a safe ladder for his use while washing windows, to require submission of the issue to the jury.

4. The decision of the Court of Appeals is in direct conflict with the holding of this Court in the case of *Brady vs. Southern Railway Company*, 320 U. S., 476, 88 L. Ed., 239, 64 Sup. Ct., 232 (1943).

It is still the law, as said by this Court in the *Brady* case, *supra*, that the weight of evidence under the Federal Employers' Liability Act must be more than a scintilla before the case can be properly left to the discretion of the trier—in this case, the jury.

SPECIFICATION OF ERRORS.

The Specification of Errors are set forth in the reasons for granting the writ, and will be omitted here.

ARGUMENT.

It is the insistence of the Chattanooga Station Company that there was no evidence of negligence on the part of the Station Company, and that the trial Court properly directed a verdict in its favor.

The leading case in support of this insistence is *Brady v. Southern Railway Company*, 320 U. S., 476, 88 L. Ed. 239, 64 Sup. Ct., 232 (1943), to which the trial Court referred.

Other decisions in support of defendant Chattanooga Station Company's contention are:

Hunter v. Texas Electric R. Co., 332 U. S. 827, 92 L. Ed., 402, 68 Sup. Ct., 203;

Eckenrode v. Penn. Ry. Co., 335 U. S., 329, 93 L. Ed., 41, 59 Sup. Ct., 91;

Tiller v. Atlantic Coast Line, 319 U. S., 554, 87 L. Ed., 610, 143 A. L. R. (and Notes), 867 (February, 1943).

The trial Court held during the trial that the "Safety Appliance Act" did not apply in the instant case, and counsel for Massey, Administratrix, etc., agreed in open Court that this was true. (Station Company's Appendix, C. R., 14a.)

The only allegations of negligence in the declaration were:

(1) The ladder had no "safety grips" or "grabs" on it to keep it from slipping on the floor and from under Frank Massey,

(2) That the floor was tile and was very slick.

There is absolutely no evidence that "safety grips" or "grabs" were in common usage; and there is no evidence whatever that there exists such a thing as "safety grips" or "grabs" for the type of ladder involved in this case.

There was no evidence that the floor was slick; on the other hand, the undisputed proof was that the floor was dry and was not slick, and was the same type of floor in common use in public buildings, including the Courthouse in which the trial was had. (Station Company's Appendix, C. R. 3a, 4a, 6a, 8a, 11a.)

The undisputed proof is that the decedent Frank Massey selected his own ladder; that he placed the ladder himself, and that he was using it without any supervision or direction from any one else. (Station Company's Appendix, C. R., 9a, 11a.)

Chattanooga Station Company respectfully directs the Court's attention to the evidence in this case to the effect that decedent Massey was using a new, well-made ladder, in perfect condition, and no broken parts about the ladder.

See testimony of R. T. Thomas, a Pullman conductor, who was the first one to reach Massey after the fatal accident, as follows:

> "7a—XQ9. You (Mr. Thomas) did observe the ladder, though? A. Yes.
>
> XQ10. There was not any broken parts? A. No.
>
> XQ11. The ladder was a new ladder? A. Yes, it was a new ladder. I noticed those stepping pieces being nailed in. It was a well constructed ladder, in other words, it was a carpenter built ladder.
>
> XQ12. It was a well built ladder? A. Yes."

Also, see testimony of Pressley Matthis, employee of Chattanooga Station Company, who was working with Massey, but on the outside of the building, and who was using a step ladder:

"10a—XQ13. And the step ladder you used was a new ladder? A. Yes, it was a new ladder.

XQ14. Both ladders were in fine condition? A. Oh, they was in perfect shape."

To entitle Lucy Massey, Admrx., etc., to recover in this case the proof would have had to show (1) that the employer, Chattanooga Station Company, furnished to decedent Massey a defective ladder of some type, or had not furnished him a safe place in which to work.

As stated in the opinion of the U. S. Court of Appeals, "Admittedly, the smooth terrazzo floor was dry and free of grease or other slick substance."

In view of this holding, and the same holding by the District Court, that decedent was furnished a safe place in which to work, the only other ground upon which Massey could recover would be evidence that the ladder was defective.

It is the insistence of Station Company that there is not a scintilla of evidence in the record which shows the ladder being used by Massey was in any way defective.

The cases cited in the Court's opinion are not applicable to the instant case.

The facts in the cited case of *Lavender, Admr., v. Kurn*, 327 U. S., 645, 90 L. Ed., 916 (1946), are totally unlike the facts here. There the facts were to the effect that employee was not furnished a safe place in which to work, in that defendant had on the side of a mail car a hook which hung down loosely, which constituted an act of negligence on the part of the defendant. In addition, there was proof that there was an uneven amount of cinders and dirt near the track, on which decedent was probably standing when struck by the hook on the mail car. Undoubtedly negligence on the part of defendant was shown in the *Lavender* case.

Another cited case, *Tennant, Admr., v. Peoria P. U. R. Co.*, 321 U. S., 29, 99 L. Ed., 620 (1943), has no application in the instant case. There the undisputed evidence was that the engineer was guilty of negligence in failing to ring the bell, as required by the rules of the defendant company.

Likewise, the facts in the case of *Highfill v. Louisville & N. R. Co.*, 154 Fed. (2d), 874 (1946) are entirely different from the facts in the instant case. There the employee sustained an injury by slipping and falling on the deck of the engine where grease and lubricating oil had been permitted to accumulate. Undoubtedly there was negligence shown on the part of the defendant.

As stated, no negligence whatever was shown on the part of Chattanooga Station Company, and the cases cited in the Court's opinion can have no application here.

Before Massey's Administratrix can recover in this case there must be some probative facts from which the negligence and the causal relation could reasonably be inferred. The essential requirement is that the mere speculation be not allowed to do duty for probative facts, after making all due allowance for reasonable possible inferences favoring the party whose case is attacked.

See *Galloway v. United States*, 319 U. S., 372, 87 L. Ed., 1458, 1473, 63 S. Ct., 1077; *Atchison, T. & St. Fe R. Co., v. Toops*, 281 U. S., 351, 74 L. Ed., 896, 50 S. Ct., 281.

It is our insistence that that requirement was not met by Massey's Administratrix, and that the District Court very properly declined to submit the case to the jury.

For the Court of Appeals to hold there was sufficient evidence of negligence to require the lower Court to submit the case is contrary to the facts in this case.

An examination of the authorities discloses that under the common law a ladder similar to the type being used by

decedent Massey was considered a simple tool, within the "simple tool" doctrine. 145 *A. L. R.*, 546.

It is admitted, however, that the "simple tool" doctrine would not apply under the Employers' Liability Act. 56 *Corpus Juris Secundum*, 926, citing *Pitt v. Pa. R. R. Co.*, D. C. (Pa.) 66 Fed. Supp., 443 (1946).

This Court should take into consideration that all ladders are not dangerous, in view of the fact that a ladder, under the common law, was considered a simple tool.

CONCLUSION.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all of the proceedings in the case numbered and entitled on its docket No. 11891, *Lucy Massey, Administratrix of the estate of Frank Massey, deceased, Appellant vs. Chattanooga Station Company, Appellee,* and that said judgment of the United States Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as may seem meet and just.

CHATTANOOGA STATION COMPANY,

BY JOE V. WILLIAMS, JR.,

Attorney for Petitioner.

APPENDIX.

ORAL RULING OF THE DISTRICT COURT ON MOTION FOR DIRECTED VERDICT.

No. 1902.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION.

LUCY MASSEY,
Administratrix of the Estate of Frank Massey,
Plaintiff,

vs.

THE CHATTANOOGA STATION COMPANY,
A Tennessee Corporation,
Defendant.

(In the absence of the jury the following proceedings were had, to-wit):

The Court: Gentlemen, I have not given all the time I had hoped to give to the study of the questions presented in the case. I went down at lunch and checked some at that, gave some consideration to it. On returning, there being quite a number of cases on this question, I checked some of them. But of course I am subject to error in my conclusion.

So far as I can recall, and I tried to check it quickly, the Safety Appliance Act is applicable to locomotives and cars. Am I right about it?

Mr. Morgan: That is true.

The Court: That is true. So this leaves out entirely that part of the Federal Employers' Liability Act, if we consider the Safety Appliance Act does not extend beyond the Federal Employers' Liability Act.

The question of negligence, of course it does provide for negligence, and we know that contributory negligence

is not a bar, neither is assumption of risk a bar. And the prime question here is, whether there is any showing of negligence. The plaintiff has been put to it to obtain proof, because they had to go into the employees of the defendant or persons closely allied with the employer or defendant. But, nevertheless, I have to take the proof as it is.

Of course that is true. I could assume that the proof might be different if they had not been employed and had not been connected with the defendant.

So, we have a situation here, taking the most favorable view of the plaintiff's testimony, with the colored man working down there, apparently in the position of a porter, something of that type, and on this occasion he was washing off a window polish. He was washing Bon-Ami off the window and using the ladder, and using the ladder. It is in proof that the company furnished ladders for general work around there for this employee and other employees. That the employees selected their own ladder, and used the ladders as they pleased. Now the particular acts of negligence, as I understand the issues, the employee was caused to use a ladder that had no safety device on the bottom of it by way of rubber or a clamp that might hold it to a floor, and that the floor where he worked was smooth, and worn slick. However, the proof shows it was smooth tile floor, which, of course, being smooth, it being of some sort of tile, the ladder might slide on it. That is true.

But, I have got to say whether there is any negligence shown or not. The furnishing of the ladder without any safety appliances on it, there is no proof to show that on this type of work the general custom is, there is some sort of safety device on the ladder.

There is some inference later on, however, they put rubber devices on the ladders, or something, to keep the ladders from sliding. But, of course that cannot be considered in proof for the reason that anything you may do after an accident, in any way as a safety device, should not be considered in evidence.

The proof shows it was a new ladder, that it was set up against the wall. The only proof we have as to the

angle of the ladder, shows it was some ten feet out, and about a fifteen foot ladder. Well, of course I know that is a relative proposition, and that you cannot say "that is an accurate statement as to just how the ladder was." But, that is as close as we could get.

I was interested in the problem in geometry. You remember the problem I was telling you about, I sent out at noon and got me a pole and put on a test in my chambers. It works out according to the problem. It would be approximately eleven feet up on the wall, that was a fifteen foot ladder ten feet back. And as the problem worked out it is just about the same.

The sum of the squares of the sides of a right angle triangle is equal to the square of the hypotenuse. Of course in this case the ladder is the hypotenuse, which would be fifteen feet. The square of which would be 225 feet. If it had been set out ten feet from the wall, the square of that would be 100 feet. To find the length of the remaining side, take 100 feet from 225 feet, leaving 125 feet. Of course the square root of 125 is a little better than eleven feet. The square of eleven being 121 feet.

This boy says he was on an eight or ten foot step-ladder, about two steps down from the top and that he reached the top of the windows. That would put him standing, say eight feet up, he was two steps down. That he was standing eight feet up, two steps down. The plaintiff was four or five rounds down, that would have him standing approximately the same height as the man on the other side.

But, of course if he placed the ladder that way, which is all the proof we have on the angle, I would be forced to say that was the sole proximate cause of his fall, his placing the ladder at that angle. But, irrespective of that I ran into that as a matter of proof.

Of course having placed the ladder at such an angle as that, then putting his weight upon it, as I understand the proof did disclose that he fell just about the time he got up on it. Somebody saw him carrying the ladder in, he put it up, got on it and it came down. That looks to me

like that is probably what would happen in this case. I say "probably," that is not a good word to use when trying to pass on a motion of this kind. But I do not see that there can be a showing of negligence. There was the furnishing of the proper ladder. There was the hard floor, and under those conditions I cannot see where you can charge the Station Company with negligence. Now, I am greatly concerned to put out a case any time, but in these cases under the Federal Employers Liability Act, if there is any sort of evidence to go to a jury, the Supreme Court has said they should go to the jury.

But I do that anyhow. I am a great believer in the jury system, and I do not take them away from the jury unless I am confident there is nothing there.

And, in this case, as I say, there is a dead man, he has some children, he has an old mother. And it is that type of case for the Court to charge the jury that they must have no sympathy in the case. The Court is charged likewise, and I have to go right, and go according to the law and the proof.

So, gentlemen, I am going to have to say I cannot see any negligence proven in this case, taking the most favorable view for the plaintiff. And, I think it has to be a negligent act of the defendant based upon the ladder.

Now, if there had been proof here to show it was a custom in such places to use a certain type of ladder, and they failed to use that type of ladder,—but, there is no proof like that in the case. One witness said it was a ladder, as I understood, in which the steps were grooved into the uprights.

It is the Court's observation, though not brought in proof, but most people get well when they have broken legs. We have them come through the court lots of times, all broken up. But unfortunately they say in this case there was a clot of blood from the injury, that death probably came from the accident, or a blood clot arose from the hemorrhages in the portion of the body, the seat of the accident, that got into the blood stream, and from there to the heart. But, I think the responsibility is on

these people, so I just cannot see it. Therefore with that idea we will have to direct a verdict.

Mr. Morgan: Your Honor, may I make one observation, I made a test for myself, for my own satisfaction at the noon hour. I used a sixteen foot ladder in the basement of the building. I laid it out ten feet from the wall, and it extended a little over eleven feet up. I was surprised. And you could not step on it. You could not get on the first rung of it or it would fall. You had to hold it.

The Court: Of course I know this testimony was relative.

Mr. Morgan: Yes, I understand that wasn't the determinative question in the case any way.

The Court: That is right. Let the jury come in.

(The jury was returned to the jury box.)

The Court: Ladies and gentlemen of the jury: In this case the defendant has made a motion for a directed verdict, which is based upon the grounds: that there is no evidence to show any negligence on the part of the defendant, which caused the death of plaintiff's intestate.

I have sustained that motion and you are entitled to know why I did that.

The case is brought under the Federal Employers' Liability Act, which makes a common carrier, and this defendant company was admitted to be a common carrier, liable for any negligent act done in its employ that causes injury to another employee. And of course it then came around to the question, whether there was any proof of negligence against the Station Company. And it became my duty to take the most favorable testimony offered by plaintiff in order to try to arrive at a decision. Because where there is any reasonable inference to be drawn, where there might be negligence, then I must pass the case to you.

But in this case I cannot see any negligence against the Station Company.

The Plaintiff, of course, was under a difficult situation, because they had to get their proof from employees

and former employees of the defendant, or from employees casually connected with the defendant, like railroad employees and others. That does not mean that they swear falsely, but maybe they might be inclined to color their testimony in the defendant's favor. But, nevertheless, I have to go by the proof, and the proof was that this colored man who was a porter down there, was furnished ladders and the witnesses say he had the right to select what ladder he wanted. He did select this particular ladder, and this ladder was a straight ladder. He went to wipe the windows for somebody else had put Bon Ami on the windows and he was going in to clean the windows off.

The proof shows a boy on the outside was on a step ladder about eight or ten feet high, and this would put him up about ten feet. And the deceased was inside the office using a straight ladder, which fell with him.

If there had been proof to show the ladder used in this work, on this type floor had to have rubber tips or similar devices to hold them, it would have been a different question. But, there is nothing in the proof about that to remotely touch on that situation. And he had that sort of ladder and he placed that ladder on the floor which was some sort of composition flooring which was smooth. There is no negligence in maintaining that kind of floor. If it is, the government is guilty of negligence in maintaining this one room, because it has a smooth floor.

There is no negligence in furnishing an employee a ladder when he has the right to select it. Therefore, there is no negligence. You can readily see that.

Then we have the additional proposition, which is not the prime reason in directing the verdict. But the proof from the conductor, who stated the ladder was out from the wall practically ten feet. A fifteen foot ladder, extending out ten feet, the ladder would stand up against the wall some eleven feet, which is proven by using Euclid's Forty-seven Theorem:

The sum of the square of the sides of a right-angle triangle is equal to the square of the hypotenuse. So, with that we have the fifteen feet the length of the ladder as

the hypotenuse; then we have one side, ten feet. The square of the hypotenuse is 225 feet; the square of the side would be 100, ten times ten. So, take that from the square of the hypotenuse, 225 feet, we have 125 feet, the square of this side, the distance up the wall. Extract the square root of that, you will have a little over eleven feet.

So, the ladder would have been sticking up about eleven feet, to where he could get up to the windows. This boy on the outside was on the stepladder, reached the window and washed that Bon Ami off. So it looks to me like outside of the failure to prove negligence in the case, comparable with the idea the reason the boy fell, when he had the ladder at a bad angle, when he went up the ladder and got his weight on it, the ladder fell and very unfortunately, he was killed.

As stated, it is very unfortunate for the children, this aged mother.

With a broken leg, ordinarily a person would not die. I am sure we have had some cases where people were all broken up. They fixed them up and they went on and got good results. But in this case evidently he got a blood clot and he died in this case, or some foreign substance in the blood stream which went to his lungs or heart and he died.

But we cannot make the Station Company pay unless they caused it.

So, I make this statement to the jury, that I am very slow in directing a verdict, as I said to them a while ago.

I wanted to give you my reasons. The type of the lawsuit and those who are the parties could not be the cause.

As I told these gentlemen, I never direct a verdict unless I feel full clarity, fully satisfied, because I am a great believer in the jury system. But in this case I cannot see any other inference. I am sure you would have agreed with me.

Therefore you are directed to find a verdict for the defendant.

* * * * *

MEMORANDUM OF THE DISTRICT COURT ON MOTION FOR NEW TRIAL.

(Filed February 6, 1953.)

Under the provisions of the Federal Employers' Liability Act, plaintiff claims damages for the death of her husband.

Upon a trial to the Court and a jury, at the conclusion of the plaintiff's proof, the Court directed a verdict in favor of the defendant. By motion, the plaintiff insists that this action of the Court was error and that a new trial should be granted.

Admittedly the deceased was an employee within the terms of the Act.

The deceased was employed by the defendant at a terminal railroad station doing station duty and platform work, which included washing and cleaning windows in the depot. While the deceased was on a ladder washing or cleaning a window inside an office in the depot, the ladder slipped from under him and he fell breaking his arm and leg and sustaining injuries which resulted in his death. The deceased was using an ordinary ladder, with two side pieces and rounds or rungs, which was new and about fourteen feet long. He was not directed by any fellow employee of any rank to do this specific job, but was working as a part of his general duties. He selected his own ladder and he placed the ladder. Another employee was on the outside of the same window working on a stepladder which was about ten feet high and the outside worker was up within a foot or so of the top. The floor in the office was terrazzo, was dry and free from any grease or other slick substance. Because of the lowness of the window and the length of the ladder, the deceased set the bottom of the ladder approximately ten feet from the wall, which placed the upper part of the ladder about ten feet from the floor. Thus, he set up a hazardous trap which resulted in being a death trap when he undertook to climb upon it.

The only negligence sought to be proven against the defendant was that the defendant had not placed any

safety device on the ladder to keep it from slipping. The only safety device suggested was rubber tips or boots on the bottom of the side pieces. There was suggested, in argument, that the defendant might have had a second man to hold the ladder, but this seems so farfetched as not to be considered. There was no proof or no offer of proof that ladders ordinarily used for these purposes are equipped with rubber tips or boots.

In a case under this Act, there must be proof of negligence and the common law conception of negligence, subject to certain qualifications not applicable here, is the guide. This is true even though the questions are federal in nature and under this federal statute there should be conformity from a national standpoint. There must be more than a scintilla of evidence to present a jury question. *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479.

It is true, as Justice Frankfurter observed in the case of *Stone v. New York, Chicago, and St. Louis Railroad Company*, decided February 2, 1953, in dissenting but stating the general law, "However, the central components of liability for negligence—that it rests upon fault and that appropriate causality must be established between the negligent circumstances and the complained-of injury—are the same for actions under the Federal Employers' Act as for any other negligence actions." And further, "Under the guise of suits of negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation."

So regardless of how the application of the Act may be viewed, the Congress only fixed liability for negligence.

When we apply the rule of negligence, which is for the failure to do what a reasonable and prudent man ordinarily would have done under the circumstances of the situation, the conclusion is reached that cases involving injury and death by reason of the operation and movement of trains would not be applicable to the case under con-

sideration. In the operation and movement of trains, there arise hazards which require unusual alertness on the part of the railroad employees; whereas, the washing of a window with a ladder would not be considered hazardous and ordinary care would not require the same vigilance.

The Court is fully aware that a verdict should not be directed if there is any substantial proof—direct, circumstantial, or proof from reasonable inference might be made whereby a factual question is presented, or where the facts are admitted and reasonable minds might differ on the conclusions to be reached.

Having this in mind and viewing the whole proof, the Court is of the opinion that there was no negligence for the defendant to have ladders for general use, including window washing, that did not have rubber tips or boots thereon, and that the sole proximate cause of the deceased's injuries, resulting in death, was his own negligence in placing a ladder at such angle that it was bound to fall when he put his weight on it.

Therefore, the conclusion is adhered to as was formerly when the verdict was directed.

The motion for a new trial is overruled.

Order accordingly.

LESLIE R. DARR,
United States District Judge.

ORDER OVERRULING MOTION FOR NEW TRIAL.

(Entered February 10, 1953 by Leslie R. Darr, Judge.)

The motion of plaintiff for new trial having been filed and heard is denied, for the reasons set forth in Memo of the Court filed herein February 6, 1953.

Enter:

LESLIE R. DARR,
Judge.

OPINION OF THE CIRCUIT COURT.

(Filed February 19, 1954.)

No. 11891

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

LUCY MASSEY, Adm'x of the Estate of Frank Massey,
Appellant,

vs.

THE CHATTANOOGA STATION COMPANY,
Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided February 19, 1954.

Before ALLEN, MARTIN and MCALLISTER, Circuit Judges.

MARTIN, Circuit Judge. In this action, brought under the Federal Employers Liability Act (45 U. S. C. A., section 51, *et seq.*) for damages for death by wrongful act, the district judge directed a verdict against the administratrix of the decedent, who met his death while in the employ of the appellee company.

Decedent, a colored porter, was engaged in his duty of washing a window in the railroad station at Chattanooga when a straight ladder, upon which he was standing in order to reach the window, slipped and caused him to fall. He died in consequence of injuries received from the fall. The appellant administratrix based her action upon appellee's negligence in failing to use ordinary care to furnish her intestate with a reasonably safe place to work and with safe appliances with which to work.

Specifically, she charges negligence to appellee in supplying for the use of her intestate a long ladder which was not equipped with rubber tips, floor grips, or safety devices of any sort.

The deceased apparently had selected his own ladder from a batch of some fifteen ladders of varying lengths from twelve to eighteen feet, furnished by appellee for use by its employees. None of these ladders was equipped with safety devices. Each employee was accustomed to select his own ladder. Admittedly, the smooth terrazzo floor upon which the ladder was placed by the deceased employee was dry and free of grease or other slick substance.

The district judge found that, "because of the lowness of the window and the length of the ladder, the deceased set the bottom of the ladder approximately ten feet from the wall, which placed the upper part of the ladder about ten feet from the floor"; and that he thus "set up a hazardous trap which resulted in being a death trap when he undertook to climb upon it." There was testimony that the decedent was up on the ladder some four or five rungs from the top when the accident occurred. Nevertheless, the judge stated his understanding to be that the decedent fell "just about the time he got up on the ladder." So there is conflicting evidence upon the point.

In his remarks to the jury in directing a verdict, the judge said that if a fifteen foot ladder extended ten feet, "the ladder would stand up against the wall some eleven feet, which is proven by using Euclid's Forty-seventh Theorem." He said further: "The sum of the square of the sides of a right-angle triangle is equal to the square of the hypotenuse. So, with that we have the fifteen feet the length of the ladder as the hypotenuse; then we have one side, ten feet. The square of the hypotenuse is 225 feet; the square of the side would be 100, ten times ten. So, take that from the square of the hypotenuse, 225 feet, we have 125 feet, the square of this side, the distance up the wall. Extract the square root of that, you will have a little over eleven feet. So the ladder would have been sticking up about eleven feet to where he could get to the win-

dows. This boy on the outside was on the step-ladder, reached the window and washed that Bon Ami off. So it looks to me * * *, outside of the failure to prove negligence in the case, * * * the reason the boy fell, * * * he had the ladder at a bad angle. When he went up * * * and got his weight on it, the ladder fell and, very unfortunately, he was killed."

The court pointed out that there was no proof or offer of proof that ladders ordinarily used for the type of work appellant's intestate was doing are equipped with rubber tips or boots; that there was no negligence upon the part of the appellee in furnishing for general use, including the activity of window washing, ladders which did not have rubber tips or boots on them; and that the sole proximate cause of decedent's injuries resulting in his death was "his own negligence in placing the ladder at such angle that it was bound to fall when he put his weight on it." However, another window washer, working on the outside of the windows, was furnished by appellee, and was using a step-ladder. There is evidence in the record that electricians who worked at the station used ladders with safety devices on the bottoms of them. The electricians were not employees of the station company. The evidence conflicted concerning the length of the ladder used by the decedent and the distance its base was placed from the wall at the time of the fatal accident.

In all these circumstances, we think the case should have been submitted to the jury. This seems clear upon the authority of *Lavender, Adm'r v. Kurn*, 327 U. S. 645, 653, and *Tennant, Adm'x, v. Peoria & P. U. R. Co.*, 321 U. S. 29. The doctrine of these two cases has been applied by this court in *Highfill v. Louisville & N. R. Co.*, 154 F. (2d) 874 (C. A. 6), and other cases.

It would seem that there was sufficient evidence of negligence, in the failure of appellee to use reasonable care to furnish appellant's intestate with a safe ladder for his use while washing windows, to require submission of the issue to the jury. See *Lillie v. Thompson*, 332 U. S. 459; *Eurie v. Thompson*, 337 U. S. 163; *Wilkerson v.*

McCarthy, 336 U. S. 53; *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54; *Williams v. Atlantic Coastline R. Co.*, 190 F. (2d) 744 (C. A. 5), *Boston & M. R. R. v. Meech*, 156 F. (2d) 109 (C. A. 1), certiorari denied 329 U. S. 763; *Boston & M. R. R. v. Kyle*, 156 F. (2d) 112 (C. A. 1).

The Supreme Court made it plain in the *Tennant* case, *supra*, that trial judges are not free to set aside jury verdicts merely because "judges feel that other results are more reasonable." The same principle, of course, applies to directed verdicts. And, in *Lavender v. Kurn*, *supra*, the Supreme Court went so far as to say that, whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Such duty in jury trials rests upon the jury and it is not incumbent upon the court to invade the province of the jury in that respect, where there is conflicting material evidence.

In a recent case, *Erie Railroad Company v. Edward W. Lade*, Jr., — F. (2d) — (C. A. 6), decided February 10, 1954, this court pointed out, in affirming a judgment entered on the verdict of a jury, that long experience has demonstrated that there are few absolutes in the law and that every case must be decided upon its peculiar facts.

In the circumstances of the present controversy, it is our view that controverted fact issues were presented, in consequence of which the case should have been submitted to the jury.

Accordingly, the judgment of the district court is reversed and the case is remanded for a new trial.

JUDGMENT OF THE CIRCUIT COURT.

(Filed February 19, 1954.)

APPEAL from the District Court of the United States for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for a new trial, pursuant to the opinion filed herein.

ORDER OF THE CIRCUIT COURT DENYING REHEARING.

(Filed May 15, 1954.)

The petition for rehearing is denied.